

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR RE:
PETITION TO AMEND RULES
REGULATING THE FLORIDA BAR and
THE FLORIDA RULES OF JUDICIAL
ADMINISTRATION

CASE NO. SC

**PETITION TO AMEND THE RULES REGULATING THE FLORIDA
BAR AND THE FLORIDA RULES OF JUDICIAL ADMINISTRATION**

THE FLORIDA BAR, pursuant to rule 1-12.1, Rules Regulating The Florida Bar and rule 2.130, Florida Rules of Judicial Administration, hereby petitions this court for an order amending the Rules Regulating The Florida Bar and the Florida Rules of Judicial Administration.

This petition has been authorized by the Board of Governors of The Florida Bar and the amendments and action proposed herein were specifically approved by the Board of Governors of The Florida Bar. As the amendments deal with a unique issue and can stand alone, they are being filed separately from The Florida Bar's annual rules filing. A formal notice containing the text of these proposed amendments was published in the January 1, 2004 issue of *The Florida Bar News*. A photocopy of that publication is included with this petition at Appendix "A."

Commentaries received by the bar in reaction to this notice and previous notices are attached as Appendix “D.” The bar also notes that there is one other matter presently before this court seeking separate amendments to the Rules Regulating The Florida Bar. *Amendments to The Rules Regulating The Florida Bar*, Case No. 03-705. That action was commenced by the bar on April 7, 2003. The proposals within the instant petition are unrelated to the pending action and may be considered independent of it.

INTRODUCTION

The amendments herein deal with the issue of the multijurisdictional practice of law. The multijurisdictional practice of law (MJP) can best be defined as a lawyer providing legal services in a jurisdiction where that lawyer is not licensed to practice law. The legal services can be in any area of the law and may take place at any stage of the representation. The client can either be from the state where the lawyer is licensed (the home state) or where the lawyer wishes to practice or provide the services (the host state). The activity usually takes place on a temporary or occasional basis. Under existing rules and case law, this practice is prohibited.

In July 2000, the American Bar Association (ABA) appointed a commission to study the multijurisdictional practice of law and sought input from state bars and

interested parties. In response, The Florida Bar established a Special Commission on the Multijurisdictional Practice of Law (“Commission I”) in 2001. Commission I studied the ABA report and, in March 2002, made several recommendations to the Board of Governors of The Florida Bar all of which were adopted by the Board.

The ABA’s final report and recommendations were adopted in August 2002, after which a second Florida Bar MJP Commission (“Commission II”) was appointed. Commission II’s mission was to study the report and make recommendations for rule changes in light of the policies adopted by the Board in March 2002. Commission II was divided into subcommittees to study all of the recommendations. The subcommittees and the full Commission met on several occasions. All matters were fully discussed after which a report was prepared. The report was circulated to the Florida Board of Bar Examiners, the Young Lawyers Division of The Florida Bar, the Special Committee to Review the ABA Model Rules 2002, the Professional Ethics Committee, and the chair and vice-chairs of the Rules of Judicial Administration Committee in March 2003, prior to any consideration by the Board of Governors.

In addition to circulating the report to the above committees, The Florida Bar published the amendments in *The Florida Bar News* and on The Florida Bar’s

website. As a result, representatives of the International Law Section and the Business Law Section of The Florida Bar contacted President Miles McGrane about an issue they saw in the recommendations. The issue involved the Commission's recommendation in the March 17, 2003, report that the rules not be amended to allow limited and temporary practice by lawyers admitted in a non-United States jurisdiction. As a result of the concerns brought to his attention, Mr. McGrane reconvened Commission II. Commission II addressed the concerns regarding non-United States lawyers to the satisfaction of the sections and the Board. The final report and recommendations, a copy of which is attached hereto in Appendix "E," were adopted by the Board of Governors on December 5, 2003.

The amendments fall within three categories: the multijurisdictional practice of law, reciprocal discipline, and *pro hac vice* admission. Taken as a whole, the amendments open the door to a limited, temporary practice that is now closed. The amendments continue support of state judicial licensing and regulation of lawyers while recognizing the multijurisdictional nature of the practice of law today. The amendments balance both of these interests while at the same time protecting the public, the legal profession, and the judiciary in Florida.

DISCUSSION OF AMENDMENTS

The bar proposes new rules or amendments to existing rules as shown in the

listing below. Each entry additionally reports common categories of information as specified in this court’s guidelines for bar rules amendments: *i.e.*, an explanation of each amendment; reasons for any changes; the sources of any proposal; names of groups or individuals who commented or collaborated during the rule development process; voting records of pertinent committees and the bar’s governing board; and, dissenting views, which will be discussed separately, regarding such proposals. As the amendments flow from the changes being proposed to rule 4-5.5, R. Regulating Fla. Bar, the amendments are not presented in numerical order.

A copy of the full text of the proposed amendments is included in Appendix “B” to this petition, followed by a separate 2-column presentation within Appendix “C,” which includes extracted text of affected rules, proposed amendments thereto, and an abbreviated recitation of the reasons for such changes as more fully expressed in this petition. The bar has received one comment in response to its official January 1, 2004, notice of this filing and the amendments published therein as noted in Appendix “D” page 93.

MULTIJURISDICTIONAL PRACTICE OF LAW

Chapter 4 Rules of Professional Conduct

Subchapter 4-5 Law Firms and Associates

RULE 4-5.5 UNLICENSED PRACTICE OF LAW

Summary: Substantially amends rule title, text, and comment to allow for the

multijurisdictional practice of law in limited circumstances and on a temporary basis.

Reasons: To facilitate the multijurisdictional practice of law in Florida while at the same time providing a level of public protection.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: Business Law Section of The Florida Bar; International Law Section of The Florida Bar; Raquel A. Rodriguez on behalf of the Office of the Governor, State of Florida; and Thomas G. Schultz. Letters showing the commentary/collaboration are attached hereto in Appendix "D," pages 1 - 38.

Committee Action: Initial amendments favorably reported by Rules Committee by fax/e-mail vote of 5-0 on May 7, 2003; subsequent amendments discussed during conference call on November 3, 2003, and reported favorably by a 6-0 vote.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: See letter from Association of Corporate Counsel (December 3, 2003) attached hereto in Appendix "D." The dissenting views are discussed more fully elsewhere in this petition.

Under current rules and case law, a lawyer licensed to practice law in another state or country but not in Florida may not, except in very limited circumstances, provide legal advice or services in Florida or involving Florida law. Recognizing that existing law has not kept up with the reality of modern practices, The Florida Bar, following the lead of the ABA, began studying the issue of the multijurisdictional practice of law in 2001. The amendments relax many of the existing restrictions and allow temporary practice by non-Florida lawyers.

The first amendment is to the title of the rule which alerts the reader that the rule also applies to the multijurisdictional practice of law. The amendments to

subdivision (a) are mainly grammatical. The subdivision keeps intact the general principle that a lawyer cannot practice law in a jurisdiction in which the lawyer is not licensed or otherwise authorized or assist another in doing so. Subdivision (b) keeps intact the general principle that a lawyer admitted in a state other than Florida or in a non-United States jurisdiction cannot establish an office or other regular presence in Florida or hold out to the public that the lawyer is admitted to practice law in Florida. However, the subdivision also recognizes that there may be times when other law, such as Federal rule or regulation, allows a lawyer to have a regular presence in Florida.

Subdivision (c) sets forth the categories and limitations of temporary practice. The categories are alternatives – if any one is met, the lawyer may engage in the activity. In reviewing the rules published in the January 1, 2004, official notice, a typographical error was noticed. Rule 4-5.5(c)(3)(B) ends with “and.” The “and” should be “or” which is the language approved by the Board of Governors. This change has been made and is reflected in the rules contained in Appendices “B” and “C.” The Florida Bar requests waiver of the notice requirements of rule 1-12.1, R. Regulating Fla. Bar, to correct this technical, typographical error.

The first category of the alternatives allows the out-of-state lawyer to come

to Florida on a temporary basis if the out-of-state lawyer associates a member of The Florida Bar who actively participates in the matter. The second category is *pre-pro hac vice* admission activity where the lawyer is authorized by law to appear or reasonably expects to be authorized. The third category allows an out-of-state lawyer to render legal services in a pending or potential arbitration, mediation, or other alternative dispute resolution if one of two conditions are met: (1) the services are performed for a client who resides in or has an office in the lawyer's home state; or (2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. As to arbitration proceedings, the comment states that in all arbitration proceedings except those involving international arbitration, more than 3 appearances in a 365-day period is considered a regular, rather than temporary, practice. The fourth and final category allows an out-of-state lawyer to provide services in Florida not covered by the other provisions if one of two conditions is met: (1) the services are performed for a client who resides in or has an office in the lawyer's home state; or (2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. As specified in the first section, only lawyers who have not been disbarred or suspended from the practice of law in any jurisdiction or who have not been held in contempt in Florida due to misconduct

when engaging in conduct permitted by the rule may come to Florida to provide legal services on a temporary basis as outlined above.

Subdivision (d) is very similar to subdivision (c) with the major difference being that the subdivision deals with lawyers admitted in a non-United States jurisdiction. These amendments were in response to the concerns raised by the International Law Section, the Business Law Section, and the Office of the Governor of the State of Florida. Representatives of both sections attended meetings. Members of the International Law Section made a presentation to Commission II regarding the issues involved with international arbitration. The presentation also addressed the concerns raised by the Office of the Governor. The presentation was later sent to the Board of Governors. The amendments were drafted in conjunction with the International Law Section and endorsed by the section. Therefore, the amendments explained below are the result of a collaborative effort over several months time.

The first section allows a lawyer who has not been disbarred or suspended from the practice of law in any jurisdiction or who has not been held in contempt in Florida due to misconduct when engaging in conduct permitted by the rule to come to Florida to provide legal services on a temporary basis. The lawyer must be admitted and a member in good standing of a recognized legal profession and

subject to effective regulation and discipline by a professional body or public authority.

As with subdivision (c), the first category allows the non-United States lawyer to come to Florida on a temporary basis if the lawyer associates a member of The Florida Bar who actively participates in the matter. The second category is *pre-pro hac vice* admission activity in a matter before a tribunal held or to be held in a jurisdiction outside of the United States where the lawyer is authorized by law to appear or reasonably expects to be authorized. The third category allows a lawyer admitted in a non-United States jurisdiction to render legal services in a pending or potential arbitration, mediation, or other alternative dispute resolution if one of two conditions are met: (1) the services are performed for a client who resides in or has an office in the jurisdiction where the lawyer is admitted to practice; or (2) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. The fourth category allows a lawyer admitted in a non-United States jurisdiction to provide services in Florida not covered by the other provisions if the same nexus requirements as discussed above are met. Subdivision (d) contains a fifth category which is not contained in subdivision (c). This category allows a lawyer admitted in a non-United States jurisdiction to provide services which are governed primarily by

international law or the law of a non-United States jurisdiction in which the lawyer is a member. Taken as a whole, the amendments allow the multijurisdictional practice of law in Florida.

Chapter 3 Amendments Involving Discipline

Without a scheme for meaningful discipline of a lawyer both in the host state and, more importantly, in the home state, the amendments recommended for adoption above do not afford any protection for the courts, lawyers, and people of the host state. A lawyer must know that any breach of professional responsibility in the host state will also lead to discipline in the home state. To reach this goal, several amendments to rules 3-4.1, 3-4.6, 3-7.2, and 3-2.1 are being proposed. The amendments are self-explanatory and are more fully discussed in the report in Appendix “E.”

Subchapter 3-2 Definitions

Rule 3-2.1 Generally

Explanation: Creates new subdivision defining “final adjudication” as a decision by an authorized disciplinary authority or court issuing a sanction for professional misconduct that is not subject to judicial review except by direct appeal to the U.S. Supreme Court.

Reasons: Rule 3-7.2 sets forth certain actions which must be taken after a final adjudication. Final adjudication is not defined. The amendment defines the term to provide guidance to members of The Florida Bar and disciplinary counsel.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: None.

Committee Action: Initial amendments favorably reported by Rules Committee by fax/e-mail vote of 5-0 on May 7, 2003; subsequent amendments discussed during conference call on November 3, 2003, and reported favorably by a 6-0 vote.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: None.

Subchapter 3-4 Standards of Conduct

Rule 3-4.1 Notice and Knowledge of Rules

Explanation: Adds language to clarify that rule provides for disciplinary jurisdiction over attorneys of other states and foreign countries.

Reasons: The amendments to rule 4-5.5 allow an attorney licensed in another state or a foreign country to practice law in Florida on a limited and temporary basis. Rule 3-4.1 as currently written, provides for jurisdiction over members of other state bars who are in Florida on a *pro hac vice* basis. As the amendments to rule 4-5.5 allow a greater range of practice and also allow non-United States lawyers to provide certain services, rule 3-4.1 is being amended to cover the broader range.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: None.

Committee Action: Initial amendments favorably reported by Rules Committee by fax/e-mail vote of 5-0 on May 7, 2003; subsequent amendments discussed during conference call on November 3, 2003; a motion was made and seconded to reinsert the language to be deleted on lines 8-11 regarding the bar's authority to discipline an out-of-state attorney; the motion was approved by roll call vote of 6-0 premised on the notion that such wording was more consistent with Commission recommendations; a motion was made and seconded to vote on the proposed amendments as so further amended; the proposal as further clarified by the Rules Committee was favorably reported in the November 3, 2003, conference call by voice vote of 6-0.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: None.

Rule 3-4.6 Discipline by Foreign or Federal Jurisdiction

Explanation: Expands current rule verbiage – retitled as subdivision (a), “Disciplinary Authority” – to additionally specify that an attorney may be subject to discipline in Florida regardless of where the attorney’s questionable conduct may have occurred, and to clarify that the attorney may be subject to discipline in more than 1 jurisdiction; within new subdivision (b), adds choice of law provisions, and labels such subdivision accordingly; similarly adds choice of law language to rule title.

Reasons: The amendments to rule 4-5.5 allow an attorney licensed in another state or a foreign country to practice law in Florida on a limited and temporary basis. The amendments are necessary to allow for discipline of attorneys who are in Florida pursuant to the rule.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: None.

Committee Action: Initial amendments favorably reported by Rules Committee by fax/e-mail vote of 5-0 on May 7, 2003; subsequent amendments discussed during conference call on November 3, 2003 and reported favorably by a 6-0 vote.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: None.

Subchapter 3-7 Procedures

Rule 3-7.2 Procedures Upon Criminal or Professional Misconduct; Discipline Upon Determination or Judgment of Guilt of Criminal Misconduct

Explanation: Within (j)(1), adds further requirement that notice of a disciplinary sanction from another jurisdiction be provided to the executive director of The Florida Bar in addition to that already furnished to the Supreme Court of Florida.

Reasons: Rule 3-7.2(j) requires a member of The Florida Bar to provide notice to this Court of discipline imposed in another state. The amendment requires that the notice also be served on The Florida Bar to easily inform The Florida Bar that discipline has been imposed.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: None.

Committee Action: Initial amendments favorably reported by Rules Committee by fax/e-mail vote of 5-0 on May 7, 2003; subsequent amendments discussed during conference call on November 3, 2003 and reported favorably by a 6-0 vote.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: None.

PRO HAC VICE ADMISSION

Pro hac vice admission gives a lawyer from another state the privilege to practice before the Florida courts in a particular matter. As it involves lawyers from a home state practicing in a host state, *pro hac vice* admission is part of the multijurisdictional practice of law debate. It was studied by the ABA and by both Florida Bar Commissions.

For the most part, the *pro hac vice* admission process is governed by rule Fla. R. Jud. Admin. 2.061. The bar's counterpart to rule 2.061 is R. Regulating Fla. Bar 1-3.10. In order to afford better protection to the public, the bar, and the judicial system, The Florida Bar is recommending several amendments to rule 2.061. Florida Rule of Judicial Administration 2.130 allows "any person" to propose amendments to court rules, therefore, these proposals may properly be made by The Florida Bar. The proposed amendments to rule 1-3.10 track the language of 2.061. The rules will therefore be discussed together.

Florida Rules of Judicial Administration

Rule 2.061 Foreign Attorneys

Explanation: Deletes language authorizing judicial discretion to allow additional appearances beyond 3 in a 365-day period and allowing appearance in related litigation; requires the payment of a nonrefundable \$250.00 filing fee to The Florida Bar; requires the use of a form motion; and includes form motion.

Reasons: In order to afford better protection to the public, the bar, and the judicial system, The Florida Bar is recommending several amendments to rule 2.061 of the Florida Rules of Judicial Administration.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: None.

Committee Action: As this rule is not part of the Rules Regulating The Florida Bar, it was not considered by the Rules Committee. The rule was presented to the Rules of Judicial Administration Committee on several occasions. While a general letter was written, see dissent below, the undersigned is not aware of any formal action being taken by that committee.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: See the following letters included in Appendix “D” and discussed more fully elsewhere in this petition: Juliet M. Roulhac on behalf of the Young Lawyers Division of The Florida Bar (May 27, 2003); and Stanford R. Solomon on behalf of the Rules of Judicial Administration Committee (June 20, 2003).

Chapter 1 General

Subchapter 1-3 Membership

Rule 1-3.10 Appearances by Non-Florida Lawyers

Explanation: Within rule and subdivision (a) titles, amends verbiage to specify that provisions address appearances “in a Florida court”; also within (a), adds requirement that any such non-Florida lawyer be “currently eligible to practice” in another state; in (a)(2), deletes language authorizing judicial discretion to allow additional appearances beyond 3 in a 365-day period and allowing appearance in related litigation; deletes (a)(4)’s prohibitions on inactive, suspended, or former bar members – now addressed in new (b); creates new subdivision (b), setting forth specific prohibitions on appearances by non-Florida lawyers; within new (c) – former (b) – rearranges content of verified motion for leave to appear, to track language of Fla.R.Jud.Admin. 2.061 and add requirements for disclosure of all bar admissions and any pro hac vice appearances in Florida within the preceding

5 years; also adds non-refundable filing fee of \$250 for all such motions, and requirements for the movant's verification and the signatures of any Florida Bar members associated for purposes of the representation.

Reasons: For consistency, tracks the amendments to Fla. R. Jud. Admin. 2.061.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: None.

Committee Action: Initial amendments favorably reported by Rules Committee by fax/e-mail vote of 5-0 on May 7, 2003; subsequent amendments discussed during conference call on November 3, 2003; a motion was made and seconded to reinsert the language to be deleted on lines 18-20 giving the court discretion to allow more than 3 appearances in a 365-day period; the motion failed by roll call vote of 3-3 preceded by discussion as to whether this action was consistent with Commission recommendations; a motion was made and seconded to vote on the proposed amendments as tendered by the Commission; the proposed amendment as tendered was not favorably reported based on a roll call vote of 3-3 on November 3, 2003.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: See the following letters included in Appendix "D" and discussed more fully elsewhere in this petition: James B. Murphy, Jr. on behalf of the Business Law Section of The Florida Bar (September 3, 2003 and December 1, 2003); and Richard N. Friedman (November 18, 2003).

Rule 2.061 allows a lawyer admitted and in good standing in another state to appear on behalf of a client in a Florida court. The rule sets forth certain restrictions including a prohibition against establishing a "general practice." As currently worded, a lawyer is presumed to be engaged in a "general practice" if the lawyer makes more than 3 appearances within a 365-day period in separate and unrelated representations. However, the rule gives the court discretion to allow

more than 3 appearances upon a showing that the appearances are not a “general practice,” or that denial will work a substantial hardship on the client. The Florida Bar is concerned that the exception allowing for the exercise of judicial discretion is taking over the rule. Therefore, the rule has been amended to delete the language allowing the judge to exercise discretion. The term “and unrelated” is also deleted as the term is too difficult to define and open to abuse. The same changes are made in rule 1-3.10.

A second amendment to both 2.061 and 1-3.10 would require the movant to file a copy of the motion that was filed with the trial court with The Florida Bar and to pay on a per case basis a nonrefundable \$250.00 fee to The Florida Bar. The court may waive the fee in cases involving indigent clients. The fee is being imposed in an effort to defray the cost of disciplining lawyers from other states who are in Florida pursuant to a properly granted motion and to make a contribution to the Clients’ Security Fund should a claim be made based on the lawyer’s behavior. Twenty-three states currently charge a fee for *pro hac vice* admission with amounts ranging from \$70.00 to \$350.00. A chart showing the states that charge and the amount charged is included in Commission II’s report attached hereto in Appendix “E.”

Currently, there is no information on how many *pro hac vice* motions are

filed in Florida. Requiring a copy of the motion to be filed with The Florida Bar will enable the Bar to begin collecting data in this regard. In order to make data entry more uniform, the Commission is proposing a form Verified Motion for Admission to Appear *Pro Hac Vice* Pursuant to Florida Rule of Judicial Administration 2.061.

The other changes to rule 2.061 and 1-3.10 are technical in nature and conform the rules to terminology used by the bar. Rule 1-3.10 is further amended to track rule 2.061. Although the language has not substantially changed, the order and numbering have been changed to that of the Judicial Administration rule. In the printing of the official notice, language which should be stricken is only shown as partially stricken. The language is “, in good standing,” and appears at line 6. Including the language is redundant and confusing. The language is shown as stricken in the rules contained in Appendices “B” and “C.” The Florida Bar requests waiver of the notice requirements of rule 1-12.1, R. Regulating Fla. Bar, to correct this technical, printing error.

APPEARANCE IN ARBITRATION PROCEEDINGS

Proposed New Rule 1-3.11

Rule 1-3.11 Appearances by Non-Florida Lawyers in an Arbitration Proceeding in Florida

Explanation: New rule patterned after proposed amendments to rule 1-3.10, setting forth guidelines and procedures for a non-Florida lawyer to appear in an

arbitration proceeding in Florida, provided that the appearance is for a client who resides or has an office in the lawyer's home state, or the appearance arises out of or is reasonably related to the lawyer's practice in another state in which the lawyer is admitted; allows lawyers admitted in a non-United States jurisdiction to appear in arbitration proceedings; waives filing fee, 3-time presumption and filing of verified statement in matters of international arbitration; defines international arbitration in comment; limits disclosure of information if otherwise confidential.

Reasons: The amendments to R. Regulating Fla. Bar 4-5.5 allow an attorney licensed in another state or foreign county to represent a client in an arbitration proceeding in Florida on a temporary basis. The rule sets forth guidelines and procedures.

Source: Special Commission on the Multijurisdictional Practice of Law 2002 (Commission II).

Commentary / Collaboration: International Law Section of The Florida Bar; Business Law Section of The Florida Bar; Thomas G. Schultz; Raquel A. Rodriguez on behalf of the Office of the Governor, State of Florida. Letters showing the commentary/collaboration are attached hereto in Appendix "D." pages 1 - 38.

Committee Action: Initial amendments favorably reported by Rules Committee by fax/e-mail vote of 5-0 on May 7, 2003; subsequent amendments discussed during conference call on November 3, 2003, and favorably reported by vote of 6-0.

Board Action: Board of Governors approved by voice vote with 2 dissents on December 5, 2003.

Dissent: See the following letters included in Appendix "D" and discussed more fully elsewhere in this petition: Juliet M. Roulhac on behalf of the Young Lawyers Division of The Florida Bar (May 27, 2003); American Arbitration Association (August 22, 2003), Horacio A. Grigera Naon of White & Case (September 3, 2003); Stephen R. Bond of White & Case (September 3, 2003); James B. Murphy, Jr. on behalf of the Business Law Section of The Florida Bar (September 3, 2003); William A. Wilson, III of Wilmer, Cutler & Pickering (September 4, 2003); Kathy M. Klock on behalf of the Arbitration Committee of the Securities Industry Association (November 21, 2003); Richard N. Friedman (November 18, 2003); and Association of Corporate Counsel (December 3, 2003).

The amendments to rule 4-5.5 would allow an out-of-state lawyer or a

lawyer admitted in a non-United States jurisdiction to come to Florida on a temporary basis to represent an individual in an arbitration proceeding if certain requirements are met. The comment to 4-5.5 sets forth a presumption regarding the number of appearances in arbitration proceedings. The specific language reads “For the purposes of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis, however, this presumption shall not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11.”

New rule 1-3.11 applies to appearances in arbitration proceedings and sets forth information which must be supplied to The Florida Bar when an appearance is made. The rule requires the filing of a statement with The Florida Bar and the payment of a nonrefundable \$250.00 fee which may be waived for indigent clients. The fee is payable on a per arbitration (appearance) basis. The statement and the fee are not required in matters involving international arbitrations. Additionally, certain information regarding the lawyer’s client is not required if the information is otherwise confidential.

As noted above, lawyers representing a client in international arbitrations are

not required to file the verified statement or pay a filing fee. International arbitration is defined in the comment to the rule. Exempting lawyers appearing in international arbitrations from certain requirements of the rule recognizes the reality of this type of practice while at the same time adding a level of public protection that is otherwise not present.

In preparing this petition, a typographical error was noted in the official notice. Rule 1-3.11(e) requires the filing of a verified statement, sets forth what is required in the verified statement, and contains the exemption for international arbitrations. Subdivision (e)(6) deals specifically with the payment of the fee. In the publication of the notice, the exemption for international arbitrations was mistakenly inserted in that subdivision as well. It therefore appears in two places when it is only needed in the first more general subdivision. In the rule approved by the Board of Governors the language appears only in subdivision (e). As this typographical error may cause confusion, it has been corrected. The correction is reflected in the rules contained in Appendices “B” and “C.” The Florida Bar requests waiver of the notice requirements of rule 1-12.1, R. Regulating Fla. Bar, to correct this technical, typographical error.

DISCUSSION OF DISSENTING COMMENTS

Dissenting comments were sent to the Special Commission on the

Multijurisdictional Practice of Law 2002 and/or the Board of Governors on four of the proposed amendments: 4-5.5, 2.061, 1-3.10, and 1-3.11. The comments were considered and debated. In some cases, the suggestions were adopted. In others, they were not. In addition, one comment was received in response to the January 1, 2004, notice in *The Florida Bar News* and the language requested has been included in this petition. While the dissents will be briefly addressed below, The Florida Bar intends to reply further to any comments filed with this Court.

Rule 4-5.5

The Association of Corporate Counsel (ACC) objects to the amendments to rule 4-5.5 as they apply to in-house counsel. One objection is to language that was included. The other objection is to ABA-proposed language that was not included.

ACC objects to the proposed language which allows a lawyer from another state to provide certain services “where the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” ACC argues that many of its in-house counsel members may live and practice in a state where they are not licensed. In other words, they are employed by X corporation, in state Y while licensed in state Z. ACC argues that the above quoted language would therefore not allow the lawyer to represent X corporation in Florida. Without agreeing or disagreeing with this statement, other provisions

of rule 4-5.5 would allow the practice. The quoted language is an “or,” not an “and.” Therefore, even if their interpretation of the language is correct, temporary practice is not precluded.

ACC also objects to The Florida Bar not including language in rule 4-5.5 which was proposed by the ABA. The language would allow a lawyer to come to Florida to work on a full-time basis for their corporate employer. The Florida Bar declined to recommend inclusion of this language as this practice is already allowed by Chapter 17 of the Rules Regulating The Florida Bar, the Authorized House Counsel Rule. Chapter 17 provides a level of protection and tracking which is not available with the ABA language. As Florida has a procedure in place which allows the practice, The Florida Bar does not agree that this language should be included.

2.061 & 1-3.10

Stanford R. Solomon wrote to The Florida Bar on June 30, 2003, on behalf of the Florida Rules of Judicial Administration Committee. The letter requests additional time to provide input to Commission II and mentions areas of study. No input was given or received, therefore, no response can be given. However, the areas mentioned in his letter were discussed and debated at length by Commission II.

Juliet M. Roulhac, on behalf of the Young Lawyers Division of The Florida

Bar, objects to the amount of the filing fee and ambiguity regarding the number of appearances. No reasons or further explanation is given. Richard N. Friedman also objects to the filing fee on constitutional grounds. The Florida Bar believes the fee is reasonable in light of the cost of the disciplinary system and the amount other states charge. The undersigned is not aware of any of those states being charged with a constitutional violation. The ambiguity, if there is one, is not created by the amendments as the language regarding the number of appearances already exists in the rules. It is the hope of The Florida Bar that the amendments will clear up any ambiguity involved with the rule by setting forth a clear number. Again, these matters were discussed and debated at length by Commission II.

The Business Law Section of The Florida Bar objects to taking out the language “and unrelated” and taking out the language regarding the judge’s discretion. The rules as currently written allow appearances in “separate and unrelated” representations. The rules also allow the judge to exercise discretion to allow more than 3 appearances in a 365-day period. Concerned that these exceptions were taking over the rule and that lawyers were practicing before the Florida courts on a regular basis and in many more than 3 cases, Commission II recommended that the language be deleted. The Board of Governors agreed. Deleting the language and setting forth a specific presumption regarding the number

of appearances keeps intact the integrity of the admission process.

1-3.11

Most of the comments filed with Commission II or the Board of Governors were in response to this rule proposal. The comments will be addressed briefly.

The most vocal opponents to the adoption of 1-3.11 are the American Arbitration Association (AAA), the Association of Corporate Counsel (ACC), and Steel, Hector & Davis on behalf of the Arbitration Committee of the Securities Industry Association (SIA). Unfortunately, all of their arguments stem from the incorrect premise that rule 1-3.11 is restricting a practice that is currently allowed.

Rule 1-3.11 is a proposed new rule which deals with non-Florida lawyers appearing in arbitration proceedings in Florida. With the exception of international arbitrations which are exempt from certain provisions of the rule, the rule applies to all types of arbitrations held in Florida. Rule 1-3.11, when read in conjunction with the proposed amendments to rule 4-5.5, allows a non-Florida attorney to appear in an arbitration proceeding in Florida as the representative of a party. This practice is currently not allowed. *The Florida Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003). (Although Mr. Rapoport was representing individuals in securities arbitration matters, the holding has general application to all types of arbitration proceedings.) Therefore, rather than restricting the practice of law in Florida, rule 1-3.11 expands

and opens the practice to non-Florida lawyers. Similarly, rather than restricting a party's right to counsel of choice, an argument also being made, the rule enlarges it. The only choice currently available to a party in arbitration is which member of The Florida Bar the person will retain. Rules 4-5.5 and 1-3.11 allow the party to retain a lawyer licensed anywhere.

SIA and ACC also argue that rule 1-3.11 somehow negates the intent of rule 4-5.5. This is incorrect. While the amendments to 4-5.5 permit appearances in arbitration proceedings if the nexus requirements are met, including the general requirement that the practice be temporary, the comment to rule 4-5.5 makes it clear that more than 3 appearances in a 365-day period are presumed to be a regular, not temporary, practice. Rather than negating the intent of 4-5.5, rule 1-3.11 implements it.

The comments of SIA focus on securities arbitration. One argument that is made is that regulation by this Court in the area of securities arbitration is preempted by Federal law. This argument was reviewed and rejected by this Court in *The Florida Bar re: Advisory Opinion - Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997).

SIA also argues that securities arbitration should be treated the same as international arbitrations. International arbitrations are exempt from certain

requirements of rule 1-3.11, specifically, the notice to The Florida Bar, the payment of a fee, and the 3-time presumption. The other requirements, such as the nexus requirements and being in good standing, still apply. As noted in the Commission's report, Florida is in the running to become the secretariat for international arbitrations under the Free Trade of the Americas Act (FTAA). Basically, Florida is being considered as the location where international arbitrations would be held. Being chosen will be a boost to Florida's economy as well as a benefit to members of The Florida Bar practicing in the business and international areas.

Exempting lawyers appearing in international arbitrations from certain requirements of the rule recognizes the reality of this type of practice while at the same time adding a level of public protection that is otherwise not present. International arbitrations which are being or will be held in Florida are held here for convenience. The international arbitration proceeding could take place anywhere – it is held in Florida because it is a neutral location with a culturally diverse population.

The same is not true for securities arbitration. A case is heard in Florida because one of the parties, usually the investor, is a resident of Florida. While convenience is somewhat of a factor, the convenience is based on where the parties

live. For example, a Florida investor who files a claim with the National Association of Securities Dealers (NASD) in Atlanta, Georgia will in all likelihood have the claim sent to the NASD's Boca Raton, Florida office for arbitration even if the broker and all of the lawyers involved reside outside of Florida. Because there is a connection with Florida other than just the location of the proceeding, The Florida Bar believes all of the requirements of rule 1-3.11 should apply.

Other matters raised by individuals objecting to rule 1-3.11 were addressed by Commission II and the suggestions adopted. Specifically, AAA and the attorneys from White & Case objected to the notice provision requiring disclosure of information regarding past arbitration proceedings on the basis that some of the information may be confidential. Commission II addressed these concerns by including an exemption if the information is otherwise confidential. The concerns of Mr. Wilmer and of the Business Law Section of The Florida Bar regarding international arbitration were addressed with the exemptions.

CONCLUSION

The need to adapt the regulations regarding the unlicensed practice of law in response to “the everchanging business and social order” was recognized by this Court long ago. *The Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1980). The current rules have not kept up with the practice of law as it exists today. The Florida Bar believes the rule amendments proposed herein strike the balance between protecting the public and recognizing the realities of the multijurisdictional nature of the modern practice of law.

WHEREFORE, The Florida Bar prays this court will enter an order amending the Rules Regulating The Florida Bar in the manner sought herein.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE AND STYLE AND ANTI-VIRUS SCAN

THE FLORIDA BAR HEREBY CERTIFIES that this petition is typed in 14 point Times New Roman Regular type and that the computer disk filed with this petition has been scanned by Norton Anti-Virus Corporate Edition for Windows and has been found to be free of viruses.